

# RESTRUCTURING

Guy Manning, Partner & Head of Campbells' Litigation, Insolvency and Restructuring Group



## About Guy Manning

Guy Manning, Partner and head of Campbells' litigation, insolvency and restructuring group, advises and appears in the Cayman Islands Courts on behalf of creditors, shareholders, provisional and official liquidators, directors, managers and other professional service providers in relation to the restructuring and liquidation of Cayman companies, funds and other entities.

Guy also has an active general litigation practice involving widely varying commercial contexts and structures, but with a particular emphasis on shareholder and investment fund disputes. He has been involved in many of the jurisdiction's highest profile disputes, liquidations and restructurings over the last decade. Guy is also a regular speaker at international fund and insolvency conferences and has given expert evidence of Cayman Islands law to various foreign courts.

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*On the matter of company restructuring, from the latest regulation updates, to the biggest challenges this legal segment faces, our next thought leader details his thought leadership in the Cayman Islands' restructuring arena.*

### What are the biggest difficulties faced today surrounding company restructuring and how do you help resolve these on a daily basis?

There are a myriad of difficulties to deal with in any restructuring, but the key issues are always devising a solution which (i) should ensure the company's medium to long term survival, (ii) is realistically capable of being adequately funded, (iii) will have the requisite support of the key stakeholders, and (iv) will be effective in compromising creditors' claims and protecting the company's assets in all relevant jurisdictions. When a Cayman company is involved it is typically as the holding company of an onshore / international group, and the Cayman legal issues which we assist with will be critical in ensuring a successful global restructuring.

### What are the typical errors you see committed by companies involved in restructuring?

The most common error is leaving it too late to retain legal and financial advisers to work with the management on a restructuring solution, and failing to engage with the key creditors sufficiently far in advance of their debt maturing. This can often lead to increased restructuring costs, dealing with issues which might otherwise have been avoided, and more fundamentally it can jeopardize the company's survival prospects.

### Have there been any legal developments pertaining to restructuring in the Cayman Islands recently?

The most significant development in the last few years has been

the Grand Court's decision in *Re China Shanshui Cement Limited* (unreported, Mangatal J, 25 November 2015). China Cement concerned the question of whether and in what circumstances directors of Cayman Islands' companies are authorised to seek to commence court supervised restructuring proceedings (which provide the protection of a moratorium on unsecured creditor action) by presenting a winding-up petition and applying for the appointment of provisional liquidators.

Prior to China Cement, the position pursuant to *Re China Milk Products Limited* [2011 (2) CILR 61] had been that if the company was insolvent (on a cash flow basis), the directors had the requisite authority to commence the process without needing either an express power in the articles of association or authorisation by a shareholders' resolution.

In China Cement, Mangatal J concluded that China Milk had been wrongly decided. The learned Judge dismissed the insolvent company's application for the appointment of restructuring provisional liquidators on the grounds that the directors had not been authorised to make the application.

Although there are conflicting decisions on the issue, applying the court's reasoning in China Cement the position is now as follows. Irrespective of whether a Cayman company is solvent or insolvent, its directors are only able to instigate a court supervised restructuring process if they are authorised to do so by a shareholders' resolution or (if the company was incorporated after

the 1st March 2009) by an express power in the company's articles.

In practice this issue has typically not been addressed expressly in the articles of Cayman companies, and so the ability to obtain a shareholders' resolution is likely to be critical. This can create timing difficulties for insolvent companies which are in or approaching a financial crisis, particularly when (as is frequently the case) the Cayman company's shares are publicly listed on a foreign exchange.

More fundamentally, it can give undue leverage to shareholders who may no longer have an economic interest in the insolvent company. It can also leave the directors (whose duty at that stage is to have regard to the interests of the company's creditors) in a very difficult position where they are unable to instigate a court supervised restructuring process which they regard as being in the interests of the creditors as a whole.

### As a thought leader, how have you worked towards adapting and moulding the restructuring law sphere in the Cayman Islands over the past decade?

Most recently I have been closely involved in working with several other leading practitioners on statutory reform to address the problems arising from the China Cement decision. It is hoped that a statutory solution addressing those issues and incorporating various other enhancements to the Cayman Islands restructuring regime will be ready to be considered by the legislature by the end of 2016. **LM**